DR ABDUL HAMID ABDUL RASHID & ANOR *a*

v.

JURUSAN MALAYSIA CONSULTANTS & ORS

HIGH COURT MALAYA, SHAH ALAM *b*
JAMES FOONG J
[CIVIL SUIT NO: 22-9-1990]
15 NOVEMBER 1996

CONTRACT: *Terms - Implied terms - Performance of services by professionals - Whether term to exercise reasonable care and skill in the performance of their craft may be implied - Whether such term so obvious that "it goes without saying"* *c*

CONTRACT: *Breach - Implied term - Failure of engineer to determine soil condition resulting in house collapsing - Whether breach of implied term of engineer's appointment to take reasonable care* *d*

TORT: *Negligence - Pure economic loss - Whether claim for pure economic loss can be entertained in action for negligence*

TORT: *Breach of statutory duty - Statement of claim - Whether provision of statute or by-laws alleged to have been breached must be stated in statement of claim - Whether action for breach of statutory duty in respect of laws not in force at the time of alleged breach can be sustained - What must be shown to succeed under cause of action for breach of statutory duty* *e*

TORT: *Breach of statutory duty - Failure of town council to observe provisions under enactments relating to buildings - Whether town council exempted from being sued - Whether cause of action based on negligence and breach of statutory duty cannot be sustained against town council - Street, Drainage and Building Act 1974, s. 95(2)* *f*

PUBLIC AUTHORITIES: *Tort - Breach of statutory duty - Failure of town council to observe provisions under enactments relating to buildings - Whether town council exempted from being sued - Whether cause of action based on negligence and breach of statutory duty cannot be sustained against town council - Street, Drainage and Building Act 1974, s. 95(2)* *g*

h

The plaintiffs hired the first defendant, an engineering firm, to construct a house on a piece of property belonging to them. The fifth defendant, who was the chief clerk and draftsman in the first defendant firm, attended to the plaintiffs. Plans of a house were drawn and signed by the fourth defendant who was a registered engineer and the proprietor of the first defendant. These *i*

plans were approved by the second defendant, the town council, and consequently, the house was built and the plaintiffs moved into residence. Unfortunately, the house collapsed as a result of a landslide and the plaintiffs were forced to abandon the house.

The plaintiffs' claim against the first and fourth defendants was based on two causes of action, they being the tort of negligence and breach of contract. With regards the plaintiffs' claim based on breach of contract, it was contended that (i) the first and/or fourth defendants failed to exercise reasonable care and skill in carrying out all aspects of the engagement having regard, in particular, to the primary objective of the plaintiffs; and (ii) the first and/or fourth defendants failed to properly and adequately implement and examine the said piece of property, its soil condition and surroundings to ascertain the suitability of the slope for the proposed house. These contentions were not within any express and specific condition in the written contract. As to the plaintiffs' claim based on negligence, it was alleged that the first and/or fourth defendants had breached a duty of care in failing to take into serious consideration the stability of the slope on which the house was built. As against this, both the defendants in question argued that this claim was for pure economic loss, the collapsed house being the defective product, and thus cannot be entertained.

As against the second defendant, the plaintiffs' claim was based on negligence and breach of statutory duties. Although the allegations of breach with particulars were spelt out in the plaintiffs' statement of claim, there was no mention of any specific provision or statute binding on the second defendant which had been breached. Instead, these were only revealed in the course of the plaintiffs' submissions. Further, one of the by-laws which the second defendant was alleged to have breached, namely the Uniform Building By-laws 1984, came into force after the house was built.

As against the third defendant, the plaintiff's cause of action was based on nuisance, negligence and the rule in *Rylands v. Fletcher*. The third defendant was a contractor engaged to erect a house on a neighboring piece of land. The third defendant was alleged to have unnecessarily allowed infiltration or seepage of water into the ground and/or allowing it to overflow onto the plaintiffs' property thereby causing saturation in the soil resulting in the landslide which brought the house down.

Lastly, as against the fifth defendant, the plaintiffs alleged that he represented himself to be an engineer of the first defendant and thus the plaintiffs named him as a defendant on the basis that he was a co-proprietor of the first defendant along with the fourth defendant.

Held:

[1] As the contentions of the plaintiff against the first and fourth defendants were not within any express and specific condition in the written contract, the only basis the plaintiffs could rely on to succeed is based on the legal concept of there being implied terms. The contract between the plaintiffs and the first and/or fourth defendants is one of performance of services by professionals who have described themselves as 'consulting civil and structural engineers'. Any persons declaring themselves to be such must reasonably and equitably be expected to take reasonable care and skill in the performance of their craft. This term of the expected reasonable care and skill is so obvious in the first defendant's appointment that the court finds it to come within the ambit of 'it goes without saying'. Thus, it qualifies to be accepted as an implied term of the contract between the first and/or fourth defendants.

[1a] The determination of the sheer strength of the soil was one of the vital factors in deciding slope stability. The fourth defendant had merely relied on sight and feel to determine the strength of the soil whereas the experts conducted exhaustive tests before concluding on the strength of the soil. As it was so essential for an engineer to determine the soil condition to a high degree of certainty, a failure to do so must be accepted as a breach of the implied term of his appointment to take reasonable care.

[1b] Little care and attention seemed to have been concentrated on the slope. An engineer of such qualification and skill as the fourth defendant should have taken all the relevant matters into more serious consideration when designing and devising the plans. This would have made the house safe for habitation. Instead, a casual attitude was adopted without much care and skill practised. The first and/or fourth defendants were therefore liable for breach of contract.

[2] A claim for pure economic loss can be entertained in an action for negligence. Otherwise, the entire group of subsequent purchasers in this country would be left with no relief against errant builders, architects, engineers and related personnel who are found to have erred. If there is any fear that this approach may encumber the local authorities to pay out substantial claims due to their negligence in granting approvals or inspecting building works, there is s. 95 of the Street, Drainage and Building Act 1974 which prohibits such authorities from being sued. This legal principle for accepting a claim for economic loss is obviously not confined to defective buildings and structures. It has far greater impact on all situations by analogy and if limited by the limitations

imposed in Murphy v. Brentwood District Council and D & F Estates Ltd & Ors v. Church Commissioners for England & Ors, it would be grossly inequitable with justice not being served.

[2a] On the facts, based on similar grounds as found by the court under the cause of action for breach of contract, it was clear that the first and/or fourth defendants were liable to the plaintiffs for negligence.

[3a] In order to succeed under a cause of action for breach of statutory duty, the plaintiffs must show that they came within the class of person intended by an Act or regulation to be protected, that the statutory provision was breached, and that they suffered damage and that this damage was caused by the breach of the provision. In essence, the entire claim based on breach of statutory duty depends on the provision of the statute or by-laws alleged to have been breached. The affected legal provision has thus become a material fact that needs to be disclosed, for failure to do so will cause the defendant to be caught by surprise and be prejudiced in their defence. Unlike the general principles of pleading where laws need not be pleaded, in an action based on a breach of statutory duty, it is absolutely necessary and essential for the plaintiffs to disclose the specific legislation affected; for it is the basis for the plaintiffs' claim.

[3b] Any allegations for breach of statutory duties which involve the second defendant in respect of the Uniform Building By-laws 1984 before it came into force cannot be sustained; there being no enacted statute at the material time to be breached. In a claim for breach of statutory duty, reliance must be on a lawful enactment and not on a piece of legislation that has no force of law in a particular area.

[3c] The exemption clause in s. 95(2) of the Street, Drainage and Building Act 1974 is clear, explicit and unambiguous in preventing this cause of action against the second defendant to succeed even in the event of a breach of statutory duties by the second defendant. The said section even exempts obligations on the part of the second defendant to carry out certain functions provided for by the Street, Drainage and Building Act 1974 and any by-laws made thereunder. Based on the reasons stated above, the plaintiffs' claim against the second defendant for breach of statutory duty must therefore fail.

[4] The plaintiffs' claim against the second defendant based on negligence must also fail because s. 95 of the Street, Drainage and Building Act 1974 exempts the second defendant from being sued. Whether it is a cause of action for breach of statutory duty or negligence, the second defendant is not subjected "to any action, claim, liabilities or demand" arising out of the facts as disclosed in the instant case.

[5] The third defendant had artificially accumulated rainwater with the excavation which was an alteration to the nature of the land. They had also interfered with rainwater by constructing transverse drains ending three quarter way down the slope of the neighbouring plot of land. All these had affected the natural flow of the water resulting in its concentrated and increased infiltration into the land thereby causing destructive effect to the plaintiffs' property. By such deeds, the third defendant had breached their duty of care towards the plaintiffs in respect of negligence, caused nuisance to the plaintiffs, as well as being liable in part under the rule in *Rylands v. Fletcher*.

[6] There was insufficient evidence to support the plaintiffs' claim that the fifth defendant was a co-proprietor of the first defendant. The fact that the fifth defendant misrepresented himself as an engineer could only, at the most, be vicariously attributed to the first defendant. Therefore, the claim against the fifth defendant was dismissed.

[Order accordingly.]

Case(s) referred to:

Anns v. Merton London BC [1978] AC 728 ***(refd)***
Bolam v. Friern Hospital Management Committee [1957] 2 All ER 118 ***(foll)***
BP Refinery (Westernport) Pty Ltd v. Shire of Hasting [1978] 52 ALJR 20 ***(foll)***
Bryan v. Maloney [1995] 128 ALR 163 ***(refd)***
Chin Keow v. Government of Malaysia & Anor [1967] 2 MLJ 45 ***(refd)***
D & F Estates Ltd & Ors v. Church Commissioners for England & Ors [1989] AC 177 ***(dist)***
Donoghue v. Stevenson [1932] AC 562 ***(refd)***
Dutton v. Bognor Regis UDC [1972] 1 QB 373 ***(foll)***
Gartner & Kidman [1962] ALR 620 ***(refd)***
Greaves & Co (Contracts) Ltd v. Baynham Meikle & Partners [1975] 1 WLR 1095 ***(refd)***
Inderjeet Singh Piara Singh v. Mazlan Jasman & Ors [1995] 3 CLJ 395 ***(refd)***
Invercargill City Council v. Hamlin [1996] 1 All ER 756 ***(refd)***
Junior Books Ltd v. Veitchi Co Ltd [1983] 1 AC 520 ***(foll)***
Kerajaan Malaysia v. Cheah Fong Chiew & Anor [1993] 2 MLJ 439 ***(not foll)***
Murphy v. Blentwood District Council [1990] 2 All ER 908 ***(dist)***
RSP Architects Planners & Engineers v. Ocean Front Pte Ltd & Another Appeal [1996] SLR 113 ***(foll)***
Rylands v. Fletcher [1868] LR 3 HL 330 ***(refd)***
Seong Fatt Sawmills Sdn Bhd v. Dunlop Malaysia Industries Sdn Bhd [1984] 1 MLJ 286 ***(refd)***
Sutherland Shire Council v. Heyman & Anor [1985] 157 CLR 424 ***(foll)***
Teh Khem On & Anor v. Yeoh & Wu Development Sdn Bhd & Ors [1996] 2 CLJ 1105 ***(not foll)***

Utramares v. Touche [1931] 255 NY 170 ***(refd)***
Winnipeg Condominium Corp No 36 v. Bird Construction Co Ltd & Ors [1995] 121 DLR (4th edn) 193 ***(foll)***

Legislation referred to:
Local Government Act 1976, s. 101
Street Drainage and Building Act 1974, ss. 53(1), 70A, 95
Uniform Building By-laws 1984, ss. 8(3), 10, 17, 25(2)

Other sources referred to:
Clerk & Lirdsell on Torts, 13 edn, p 851

For the plaintiff - N Pathmanathan (D Tan with him); M/s Skrine & Co
For the 1st, 4th, 5th defendants - Ngeow Yin Ngee (Mohd Daud & Ngeow with him)
For the 2nd defendent - Noor Hadi Sallehon (Salwah Mohd Ghazali with him); M/s Hadi Zul & Khairi
For the 3rd defendant - Ng Kay Eng (GT Vanan with him); M/s Zarina GT Vanan & Assocs

Reported by S Dharmendran

JUDGMENT

James Foong J:

The plaintiffs are husband and wife, and were at all material times owners of a piece of property known as Lot 3007, Kemendah Heights, Selangor ('Lot 3007'). In need of professionals to draw up plans to build a house on Lot 3007, the husband, the first plaintiff, walked into the office of the first defendant. The first defendant had described itself as a firm of 'consulting civil and structural engineers'. In attendance at the first defendant's office was the fifth defendant who gave an impression to the first plaintiff that he was the engineer of the firm, when in fact he was only a chief clerk and a draftsman. Plans of a double storey house were then drawn and signed by the fourth defendant. The fourth defendant was a registered engineer with the Board of Engineers of Malaysia at the material time, but no longer so after being struck off the rolls when he admitted to the regulatory body of engineers that he breached the rules by operating two firms at the same time, one of which being the first defendant.

Relevant building plans were submitted to the second defendant, the town council of the area. The plans were approved with the usual specifications and conditions. Building then commenced until it was completed and handed over to the plaintiffs on or about April 1985 whereupon, the plaintiffs moved into residence. Until 18 September 1988, no certificate of fitness was issued by the second defendant for the occupation of this house, though there was an inspection by an officer from the second defendant.

On 18 September 1988 at about 3am, the plaintiffs were awoken by an unusually loud sound. When the first plaintiff looked out of his bedroom window facing a river below the house he was unable to see the tops of some trees which he had planted on the slope. A concrete deck and the boundary brick wall which were erected on this part of the land had tilted and collapsed respectively. The plaintiffs and the family rushed out of the house to take refuge with a neighbour some short distance away. At about 5am, the first plaintiff heard shattering sound of glasses echoing from his house. By 6am, when sufficient daylight appeared, the plaintiffs returned to inspect their house and found that virtually half of the house facing the river had crumbled due to landslide.

This incident was reported to the authorities and at the instigation of the second defendant, an engineering consultant firm known as Kumarasivan Tan & Ariffin Sdn Bhd ('KTA') was appointed to determine the cause. Together with a geo-engineering expert by the name of Dr Ramli, a report was issued on 3 April 1989.

Basically, this report attributes the cause of the collapse to the following:

(1) the slope on which the house was built was steep with a gradient of about 45 degrees;

(2) engineers advising on the building and construction of the house took little consideration in assessing the stability of the slope;

(3) an excavation that was carried out on a neighbouring land known as Lot 3008 at the material time by the third defendant who was the contractor engaged in erecting a double storey bungalow thereon;

(4) heavy rainfall; and

(5) toe erosion at the river banks bordering Lot 3007.

As the result of the collapse, the plaintiffs suffered damages, and all parties agree that the quantum shall be as follows:

(a) loss for the replacement of a new house	RM293,000
(b) loss of furniture, fixtures and fittings	RM 43,623
(c) guard wages to look after the partially collapsed house	RM 2,500
(d) rentals for alternative accommodation from 18 September 1988 to June 1994	RM 25,050
	RM364,173

The court shall now proceed to deal with the issue of liability of each of the defendants.

Against The Fifth Defendant

The first defendant was a firm which the plaintiffs claim that the fourth and fifth defendants were its proprietors. Against them, the cause of action in tort is negligence, and in contract is a breach of the terms and conditions of their appointment.

Save and except for the first plaintiff's claim that the fifth defendant represented himself to be an engineer of the first defendant when the first plaintiff dealt with him, there is no other evidence adduced by the plaintiffs to support their contention that the fifth defendant was in fact a co-proprietor of the first defendant. On the contrary, the fourth defendant has admitted that the fifth defendant was only his chief clerk and draftsman. The fifth defendant supports this claim and there is no challenge by the plaintiffs against these assertions. Further, in the pleadings of the plaintiffs, there is no claim against the fifth defendant personally for negligence or breach of contract, leaving the only claim against him to be that of a co-proprietor of the first defendant. As there is an absence of evidence to support this contention, the claim against the fifth defendant should be dismissed. The fifth defendant's actions, at most, can only be vicariously attributed to the fourth defendant.

Against The First And Fourth Defendants

Any reference thereto to the first defendant will in fact also apply to the fourth defendant.

Since the plaintiffs' claims against the defendants are based on two causes of action, the tort of negligence and breach of contract, the court shall deal with them separately taking the latter into consideration first.

The contractual relationship between the plaintiffs and the first defendant (which is basically the fourth defendant) derives from a letter of appointment tendered as exh P12. In it, the first defendant agree 'as your (the plaintiffs') consultant engineers to prepare the civil and structure drawings and calculations and to submit to the respective authorities'. These drawings and calculations, as the heading in exh P12 specifies are for the plaintiffs' house. Other than this brief declaration of obligation and another two short paragraphs pertaining to the amount of professional fees charged and the mode of payment, no other terms are elaborated.

By the nature of the plaintiffs' claim on contractual liability, the contentions are as follows:

(i) the first and/or fourth defendants failed to exercise reasonable care and skill in carrying out all aspects of the engagement having regard in particular to the primary objective of the plaintiffs; and

(ii) the first and/or fourth defendants failed to properly and adequately implement and examine Lot 3007, its soil condition and surroundings to ascertain the suitability of the slope for the proposed house.

As these contentions are not within any express and specific condition in the written contract, the only basis the plaintiffs can rely on to succeed is based on the legal concept of there being implied terms.

The principle of implied terms being read into any contract is well accepted in our courts, and for it to be applicable certain conditions must be fulfilled. On these, Lord Simon in the Privy Council case of *BP Refinery (Westernport) Pty Ltd v. Shire of Hasting* [1978] 52 ALJR 20 spelled them out as follows:

> In their [their Lordships'] view, for a term to be implied, the following conditions must be satisfied: it must be reasonable and equitable; it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; it must be capable of clear expression; it must not contradict any express term of the contract.

In the circumstances of this case, the contract between the plaintiffs and the first and/or fourth defendants is one of performance of services by professionals who have described themselves as 'consulting civil and structural engineers'. Any persons declaring themselves to be such must reasonably and equitably be expected to take reasonable care and skill in the performance of their craft. If this is not the case, why then should a layman engage and pay a price for their services? This term of the expected reasonable care and skill is so obvious in the first defendant's appointment that the court finds it to come within the ambit of 'it goes without saying'. Further, this term is clear in expression and contradicts no other terms in exh P12. For these, it qualifies to be accepted as an implied term of the contract between the plaintiffs and the first and/or fourth defendants.

Having accepted it as an implied term in the contract, what then is the degree of reasonable care and skill implied into the contract? Towards this, it must be the test as laid down in *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 118, which is adopted by our courts in *Chin Keow v. Government of Malaysia & Anor* [1967] 2 MLJ 45 and *Inderjeet Singh a/l Piara Singh v. Mazlan bin Jasman & Ors* [1995] 3 CLJ 395; [1995] 2 MLJ

646. Though this proposition was expounded in a cause of action based on negligence, for the purpose of determining the extent of reasonable care and skill of a professional, it cannot be much of a variance. This approach was adopted by Lord Denning in the case of *Greaves & Co (Contracts) Ltd v. Baynham Meikle & Partners* [1975] 1 WLR 1095, which is a case of a similar nature as the case before the court. There, the defendants, a firm of consultant structural engineers, were sued for breach of an agreement for failing to properly design the structure of a warehouse, resulting in subsequent structural defects. Lord Denning presiding over the Court of Appeal had this to say (at p. 1101E):

> It seems to me that in the ordinary employment of a professional man, whether it is a medical man, a lawyer, an accountant, an architect or an engineer, his duty is to use reasonable care and skill in the course of his employment. The extent of this duty was described by McNair J in *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582 at p. 586, approved by the Privy Council in *Chin Keow v. Government of Malaysia* [1967] 1 WLR 813 at p 816.
>
> > where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.

The fourth defendant through the vehicle of the first defendant had professed to be a consultant civil and structural engineer. His specialised craft was to advise and design structures that are adequate and safe for a particular purpose. Why then did the house collapse, and was it due to the fourth defendant failing to exercise his skill to the standard of a man professing similar professional craft? To examine this, one would have to refer to the reports by the experts. One is prepared by KTA with Dr Ramli's testimony in court to elaborate on it. The other is a report prepared by Dr Toh on 27 April 1995 – exh. D20 – done almost six years after the collapse of the house, at the request of the first and/or fourth defendants.

Basically, in KTA's report, the collapse of the house was attributed to slope failure caused by the lateral movement of the earth supporting the foundation of the house. This was due to infiltration of water, such as rainfall which increased saturation of the soil causing a rise in water table and a reduction in the soil suction. It was stated in the report that:

> ... this result in a decrease in the effective stress and therefore soil sheer strength, to a point where the total sheer resistence along the potential failure surface is insufficient to sustain equilibrium of the slope.

In KTA's opinion, though 'it is extremely difficult to predict the relationship between suction and rainfall intensity for a particular soil profile, a conservative analysis could be made by assuming sheer strength parameters for saturated soil. This, coupled with a reasonable assumption of piezometric heads within the slope, would give a conservative indication of the factor of safety against failure of the slope. Such an analysis, based on sheer strength and other data as shown in Drg No RBM-FR-89-2, gives a safety of about 1, indicating that the slope was of doubtful stability'.

Dr Toh, though questioned the high water table grafted in KTA's report, is basically in agreement with the theory of the movement of soil. The main difference between his report and that of KTA's is that he attributes the failure of the slope not so much on the high water table but more on the toe failure of the slope near to the river which substantially supported the original slope.

Now, let's examine what the fourth defendant said and did. According to him, 'dealing with soil is like taking out daily meal'. Firstly, he had a visual inspection. From this, he said, 'one will be able to determine whether there is a need to machine bore to obtain the subsoil. When boring is necessary, the extracted soil will be sent to the laboratory for test'. For lot 3007 however, no subsoil was extracted for laboratory examination. Instead, the fourth defendant just had a visual examination of the slope and came to a conclusion that the slope, being a cut slope as compared with a filled slope, extraction by machine bore to obtain the subsoil was not necessary. He also observed that the slope was well done with a safe gradient. Though he did notice the river at the bottom of Lot 3007, he felt that it was a distance away from where the house was to be erected. He also added that:

> I did not worry about the river because there was drainage contribution by the original developer under usual state authority requirement and this is for the maintenance of the river by channelling it. I took it for granted that the government will channel it.

In respect of the soil, he took some samples from the exposed layer on the land in his hand, examined it visually, and concluded it to be a silty sand soil. To him, this soil 'has good drainage properties; it drains very fast'.

As regards to the house, piling was recommended and carried out just before the slope so that the structure of the house would 'not place too much weight on the slope'.

All this evidence of the fourth defendant, considered in the light of the expert opinions of KTA's report and that of Dr Toh's, reveal fundamental weaknesses. Firstly, as admitted by the fourth defendant himself under cross-examination, 'I cannot ascertain the soil by simply looking at it'. By just looking and feeling the soil, he agrees that the sheer strength of the soil cannot be determined. Yet, it is an accepted fact by the two expert engineers and to a large extent by the fourth defendant himself that the determination of this sheer strength of the soil was one of the vital factors in deciding slope stability. Exhaustive tests were conducted by both Dr Ramli and Dr Tho in the laboratory on the nature and strength of the grain found on Lot 3007, but with this professional, the fourth defendant, his judgment depended only on visual and feel. Further, though silty sand soil has good drainage properties, the fourth defendant also admits that 'water also enters (into such soil) very fast, and water does not drain out immediately - there would be a period when the water will be held in the soil'. If this is his theory, then suction in the soil will be saturated, affecting its stress effectiveness to be reduced to a point where the total sheer strength resistance would fail resulting in a landslide. So essential is the need for an engineer to determine the soil condition to a high degree of certainty, particularly on a gradient such as Lot 3007, that a failure to do must be accepted as a breach of implied term of his appointment to take reasonable care.

The level of the existence of the water table on the said land before the landslide is a hotly debated issue between Dr Ramli and Dr Tho. Both their assumptions on where this water table was, is based on facts after the slope had failed. Nevertheless, despite this difference of opinion, both agree that it plays an important part in the determination of slope stability. If the water table is high, then the slope is more vulnerable. This is only elementary and yet, according to the fourth defendant, a qualified engineer, he felt that, 'at the time I (he) looked at the site and drew my plans, I (he) did not make an assumption of where the water table was'. This certainly is a clear breach of professional duties.

The presence of the river cannot be ignored. Though it may provide scenic beauty to the owner of the land above, its potential of threat to the land was apparent. This, the court had the opportunity of observing during a visit to the site. The fourth defendant had also made a similar observation and a conclusion where, besides what he uttered earlier, adds, 'I cannot say the river poses absolutely no danger but I assumed that the general development would have taken the river into consideration'. This assumption together with his belief that since the owner pays drainage contribution, the government will channel the river are mere presumptions, taken for granted by him, and not substantiated or investigated as a professional in this field would have done.

As a qualified engineer on civil and structural matters, with a slope as steep as that found in Lot 3007 coupled with a river of swift flowing water, the fourth defendant should have taken serious and in depth consideration of its presence when recommending, planning and finally building a house on the land. Presumptions have no place in this trade particularly when structures to be erected thereon must be able to withstand and accommodate natural and existing forces. Though financial costs can overcome any slope instability in a situation such as this, but at the very least the same should be made known to the owner. In this case, this was not even presented.

Faced with a sharp gradient as that in Lot 3007, and a river at its bottom, little care and attention seemed to have been concentrated on the slope which practically engulfed two thirds of the land in Lot 3007. In the opinion of the court, an engineer of such qualification and skill as the fourth defendant should have taken these matters into more serious consideration when designing and devising plans that would have made the house erected thereon safe for habitation. Instead, a casual attitude was adopted without much care and skill practised. Such work is indeed a far cry from that expected of a professional in a similar field. As KTA's report prepared also by a firm of consulting engineers remarked at p. 10, 'it is evident that no systematic attempt to assess the stability of the slope based on established engineering techniques' were adopted. Again, this seems to be the view of Dr Toh, a qualified engineer by his first degree and supported by the first and/or fourth defendants' own witness. Dr Toh opined that, 'the engineers should have taken into account all these factors, ie, water table level plus wetting area before building a house on such a terrain'. Under these circumstances, the court hereby finds the first and/or fourth defendants liable to the plaintiffs for breach of contract.

The court shall now move on to consider the plaintiffs' claim for negligence. Basically, they allege that the first and/or fourth defendants have breached a duty of care in failing to take into serious consideration the stability of the slope on which the house was built. Against this, Mr Ngeow, counsel for both the defendants immediately maintains that this claim is for pure economic loss, the collapsed house being the defective product. With this defence, the court is forced to move into an arena of fierce legal embartlement presently raging throughout the entire common law practising nations, and to take a legal stand.

To understand this 'loaded' term of pure economic loss or economic loss, one has to move back in time, to the creation of the principles of negligence in the infamous case of *Donoghue v. Stevenson* [1932] AC 562. In that case, Lord Atkin expounded the principle of where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can reasonably be foreseen to be likely to cause physical injury to person or damage to his

property other than the damaged property itself. By this proposition, a person without contractual relationship can claim from another, damages for injury suffered by him or damage to his property, other than the defective product itself. Any claim to this defective product either in the manner of making good or replacement thereto, is a claim for pure economic loss. This can be better explained in the context of the facts in *Donoghue v Stevenson* itself. In that case, the consumer of a bottle of ginger beer which contained a dead snail was successful in her claim against the manufacturer for negligence resulting in injuries to her health and damage to her property (if any) other than the contaminated bottle of ginger beer, it being the defective product.

This principle has been applied to different but analogous factual situations for a substantial period of time since it was first established, but often the last condition of this proposition was not seriously considered in respect of defective houses until the case of *Dutton v. Bognor Regis UDC* [1972] 1 QB 373. In this case, the plaintiff was the second purchaser of a house and soon after she moved in, she found serious defects in the internal structure of the building. Investigation revealed that this was caused by inadequate foundation due to the fact that it was constructed on the site of a rubbish tip. She sued the local council whose building inspector was negligent in failing to detect the defect at an early stage of the building works. The only issue before the Court of Appeal in consequence to an award of damages to the plaintiff by the court of first instance for the estimated cost of repairs of the house and the surveyor fees, was whether the council was liable to the plaintiff for pure economic loss; pure economic loss being the claim on the defective product, *ie*, the defective house. The Court of Appeal dismissed the appeal and found in favour of the plaintiff. By this, it means a departure from the principle that the defective product itself cannot be claimed. This gives rise to a case of recovery of economic loss which was not consequent on any injury to person or damage to property.

Dutton's case was approved by the House of Lords in *Anns v. Merton London BC* [1978] AC 728. Here again, the plaintiff who took a long lease in a block of flats found cracks in the wall. The cause was due to inadequate foundation. The builder was sued and so was the local council, the latter, for allowing the builder to construct the building on inadequate foundation or in failing to carry out necessary inspection or approving the foundation. The House of Lords held that the council owed a common law duty of care to the plaintiffs. This again is a claim based on the defective product itself and thus pure economic loss can be recovered.

Though the above two authorities involve the liability of the local council, the House of Lords in *Junior Books Ltd v. Veitchi Co Ltd* [1983] 1 AC 520 dealt directly with the builder's liability to the owner of the building with

whom he had no contractual relationship with. They too were found liable for negligence on a claim for economic loss.

In 1989, this legal proposition in the motherland of common law underwent a drastic change, and retreated from the broad view they took earlier. In the case of *D & F Estates Ltd & Ors v. Church Commissioners for England & Ors* [1989] AC 177, the House of Lords dismissed the Court of Appeal's decision basically on the following grounds:

(1) any duty owed by a contractor to a home owner with respect of quality of the construction must arise in contract and not in tort;

(2) that to allow the recoverability for the cost of repairing defects in the building would have the effect of creating a non-contractual warranty of fitness;

(3) the contractor can only be held liable in tort to subsequent purchaser on negligence which caused physical injury or damaged to other property other than the damaged property.

Once again, the facts in this case are virtually similar to the cases referred to earlier. The defendants were main contractors hired by the owner to build a block of flats. A sub-contractor was engaged by the main contractor to carry out plastering work which they performed negligently. The plaintiff, a lessee to a flat in this block, discovered that the plaster on the ceiling and wall was loose. He repaired it and sued the original contractor for the cost of repairs and estimated cost of future remedial works.

The decision of *D & F Estates Ltd* was fortified by the later case of *Murphy v. Brentwood District Council* [1990] 2 All ER 908, in which the House of Lords expressly departed from *Anns*. Here, the defendant's council approved the design on the foundation of a house which was found by a subsequent purchaser to be defective. The highest court of appeal in the United Kingdom ruled that the defendant's council owed no duty of care to the plaintiff in respect of the damage of the kind sustained. The reasons, as Lord Keith put it (at p. 921A-D):

> To start with, if such a duty [of care] is incumbent on the local authority, a similar duty must necessarily be incumbent also on the builder of the house. If the builder of the house is to be so subject, there can be no grounds in logic or in principle for not extending liability on like grounds to the manufacturer of a chattel. That would open on an exceedingly wide field of claims, involving the introduction of something in the nature of a transmissible warranty of quality. The purchaser of an article who discovered that it suffered from a dangerous defect before that defect had caused any damage would be entitled to recover from the manufacturer the cost of rectifying the defect, and,

> presumably, if the article was not capable of economic repair, the amount of loss sustained through discarding it. Then, it would be opened to question whether there should be a right to recovery where the defect renders the article not dangerous but merely useless. The economic loss in either case would be the same. There would also be a problem where the defect causes the destruction of the article itself, without causing any personal injury or damage to other property. A similar problem could arise, if the *Anns* principle is to be treated as confined to real property, where the building collapses when unoccupied.

In another part of his judgment, Lord Keith proceeded with (at p. 923D):

> So far as policy considerations are concerned, it is no doubt the case that extending the scope of the tort of negligence may tend to inhibit carelessness and improve standards of manufacturer and construction. On the other hand, overkill may present its own disadvantages.

Unfortunately, these sentiments do not seem to be shared by the Commonwealth counterparts. Starting with New Zealand, the case of *Invercargill City Council v. Hamlin* [1996] 1 All ER 756 refused to follow *Murphy*. Ironically, this is an appeal heard before the Privy Council which affirmed the decision of the New Zealand Court of Appeal for upholding the trial judge's finding that the city council was liable for negligence to the plaintiff based on the following facts. The plaintiff contracted a builder who sold him the land to construct a house thereon. In the course of construction, a building inspector from the city council inspected and approved the work to be in accordance with the council's by-laws. Years later, cracks appeared in the house leading to the plaintiff's claim against the city council. The reasons forwarded by the Privy Council for not adopting *D & F Estates Ltd and Murphy* appear to be:

(a) New Zealand Court of Appeal is entitled to develop the common law of New Zealand according to local policy consideration in areas of common law which are developing; and

(b) the perception in New Zealand is that the community standards and exception demanded the imposition of a duty of care on local authorities and builders alike to ensure compliance of by-laws, and the Court of Appeal of New Zealand has built up a long line of authority based on link concept of control by the local authority of building works through the enforcement of its by-laws, and reliance on that control by the purchaser.

Next, comes Canada in the case of *Winnipeg Condominium Corp No 36 v. Bird Construction Co Ltd & Ors* [1995] 121 DLR (4th edn) 193. Here, a developer entered into a contract with a general contractor called Bird

Construction Ltd ('Bird) to construct an apartment block. Works were carried out according to plans drawn by the architects – Smith Carter. As for the external cladding, it consisted of slabs of stones which were installed by a sub-contractor. The plaintiff, who became the subsequent owner of the apartment, had to repair a section of the cladding which fell. He claimed from Bird, Smith Carter and the sub-contractor for cost of repairs incurred due to their negligence. Bird applied to strike the plaintiff's claim on the ground that it disclosed no reasonable cause of action. The court of first instance disallowed the application which was upheld by the Canadian Supreme Court. La Forest J, delivering the judgment of the Supreme Court, is of the following views:

> The underlying rationale for this conclusion is that the person who participates in the construction of a large house and permanent structure which, if negligently constructed, has the capacity to cause serious damage to other persons and property in the community, should be held to a reasonable standard of care.

He then continues:

> This is important because, in my view, the unfortunate result of the reasoning in *D & F Estates* is that it leaves the subsequent purchaser with no remedy against the contractor who constructs the building with substandard materials and substandard workmanship and thereby puts subsequent purchasers at considerable risk.

In Australia, initially in the case of *Sutherland Shire Council v. Heyman & Anor* [1985] 157 CLR 424, 60 ALR 1 found that the council was not guilty of negligence for approving plans which subsequently showed inadequate footings. However, in their latest landmark decision in *Bryan v. Maloney* [1995] 128 ALR 163, the High Court of Australia by a majority supported the trial judge's ruling that the council was liable for negligence to a subsequent owner of the property who was put to loss by the defective house. In their judgment, the High Court of Australia has this to say:

> The relationship between them [the subsequent purchaser and the builder] is marked by proximity in a number of important respects. The connecting link of the house is itself a substantial one. It is a permanent structure to be used indefinitely and, in this country, is likely to represent one of the most significant, and possibly the most significant, investment which the subsequent owner will make during his or her lifetime. It is obviously foreseeable by such a builder that the negligent construction of a house with inadequate footings is likely to cause economic loss, of the kind substantiated by Mrs Maloney, to the owner of the house at the time when inadequacy of the footing first become manifest.

Closer to home in Singapore, a similar issue appeared in the case of *RSP Architects Planners & Engineers v. Ocean Front Pte Ltd & Another Appeal* [1996] SLR 113. LP Thean, judge of the Court of Appeal practically combed the entire common law countries for enlightenment as to whether the plaintiff, a management corporation of a condominium, could sue the developers and the architects for pure economic loss arising out of faulty construction of the common property in the building. Ultimately, the Court of Appeal of Singapore elected not to follow *Murphy* and *D & F Estates* and found that the builders and architects can be liable for negligence.

At home, two High Court decisions are made on this subject. The first is the case of *Kerajaan Malaysia v. Cheah Foong Chiew & Anor* [1993] 2 MLJ 439. Wan Mohamed J presided as follows (at pp. 4471-448B):

> Kerugian yang dialami oleh plaintif adalah kerugian atau kehilangan ekonomi tulen [pure economic losses], dan defendan ketiga tidak boleh dikenakan tanggungan [liability] di bawah tort di atas kerugian yang dialami oleh plaintif dalam kes ini oleh kerana tiada siapapun yang cedera atau tidak harta kepunyaan orang lain rosak akibat daripada perbuatan atau salahlaku oleh defendan ketiga. Keputusan yang dibuat oleh Dewan Pertuanan [House of Lords] dalam kes *Murphy v. Brentwood DC* dan lain-lain kes lagi yang membuat keputusan yang sama, adalah sangat munasabah, berpatutan dan sepatutnya diterima sehinggga bila-bila masa pun.

Peh Swee Chin FCJ sitting as a High Court judge in a more recent case of *Teh Khem On & Anor v. Yeoh & Wu Development Sdn Bhd & Ors* [1996] 2 CLJ 1105; [1995] 2 MLJ 663 had the opportunity to confront this issue. He adopted the decisions in *Murphy* and *F & D Estate.* Though not directly stating the reason for his preference, the court was of the view that it was founded in the fear of extending the scope of liability 'for an indeterminate class'. It is rather unfortunate that we are deprived of Peh Swee Chin FCJ's further elaboration and in depth reasonings for which he is highly acclaimed, particularly when 'there are many cases which are not mentioned in the judgment and which allowed for recovery of pure economic loss in an action for tort', but he felt that 'this is neither the place nor the time to discuss all of them'.

In *Teh Khem On,* the purchasers purchased a house from the vendor/ builder. After taking possession, they found cracks on the wall, the ground was uneven and the upstairs bathroom leaking. This was repaired by the vendor/builder but subsequent defects appeared. This led to a series of claims and counterclaims between the purchasers, the vendor/builder and the architects and engineers who were involved in the design and drawing of the house. The architects and engineers contended that the purchasers' claim being for pure

economic loss is not recoverable in negligence. To this, Peh Swee Chin FCJ agreed when he said (at p. 677A):

> The decision of *D & F* Estates in the House of Lords, in so far as it concerns the non-recoverability of such pure economic loss as described above by an owner of the house against the builder in tort, ie by way of an action in negligence, was confirmed twice by the House of Lords in *Murphy v. Brentwood District Council* [1990] 2 All ER 908 and *Department of Environment v. Thomas Bates & Sons Ltd* [1990] 2 All ER 943.

In the light of the substantial persuasive authorities on these conflicting claims and without any determination from our appellate courts, the court is impelled upon to decide whether to allow a claim for pure economic loss or to reject the same. For this, it is essential to unearth from the cited authorities the rational the courts expounded in arriving at their decisions.

For those against allowing the claim for pure economic loss, it is primarily to avoid the creation of liability 'for an indeterminate amount for an indeterminate time to an indeterminate class', to quote Cardozo CJ in the American case of *Utramares v. Touche* [1931] 255 NY 170, otherwise it would 'open an exceedingly wide field of claims' or creating 'endless indeterminate liability' or 'the overkill may present its own disadvantages'. On the opposing camp in favour, one has 'community's expectation demand of third parties' to exercise due care and compliance with relevant by-laws, or the deprivation of relief would not justify the economic suffered on the defective product, or the moral duty of third party to exercise care.

Of all the reasons against allowing pure economic loss, the fundamental rational is still to prevent the creation or extension of liability to an indeterminate amount for an indeterminate time to an indeterminate class'. But this could be a misconception and an unallied fear. Interpreting through the circumstances of all the cases cited, the amount of damages claimed is not an indeterminate amount. They are the expenses and costs involved in repairing, making good or replacing the defective product, or cost that may be involved in ensuring the defective product is of the condition that it should be in the first place. As for indeterminate time, it may be true that liability to a subsequent owner might be greater than the first owner but as the High Court in Australia in *Bryan v. Maloney* [1995] 128 ALR 163 states, it can 'limited by the element of reasonableness both in the requirement that the damage be foreseeable and in the content of the duty of care'. In respect of indeterminate class, the court feels that it is best put in the High Court Justices in *Bryan v. Maloney* as follows:

> The similarities between the relationship between the builder and the first owner and the relationship between builder and subsequent owner as regards the particular kind of economic loss are of much greater significance than the differences to which attention has been drawn, namely the absence of direct contact or dealing and the possibly extended time in which liability might arise. Both relationships are characterized, to a comparable extent by the assumption of responsibility on the part of the builder and likely reliance on the part of the owner. No distinction can be drawn between the two relationship in so far as the foreseeability of a particular kind of economic loss is concerned; it is obviously foreseeable that loss will be sustained by whichever of the first or subsequent owners who happen to be the owner at the time when the inadequacy of the footing becomes manifest.

With these arguments, one wonders why there is such limitation imposed upon a claim for pure economic loss, for after all the entire concept of negligence is to extend liability beyond the borders of privity. To impose such a restriction is highly inequitable particularly in cases where the duty of care and the breach of such duty are found to be substantiated. There should be no fear that carelessness will be inhibited and the standard of manufacturing and construction section will be improved by the abolition of this so called limitation to a claim for pure economic loss, for after all, is it not this value that society from one generation to the next strives to achieve. To adhere to old principles and leaving it to Parliament to resolve the issue is by no means a solution, since the principle of negligence itself is founded on common law, and it is common law of the United Kingdom that has a change of heart. Possibly, this could be a policy decision in that country as can be reflected in Lord Keith's judgment in *Murphy* when he said (at p. 923-H):

> ... *Anns* has the effect of imposing on the builders generally a liability going far beyond that which Parliament thought fit to impose on house builders alone by the Defective Premises Act 1972, a statute very material to the policy of the decision but not adverted to in it.

In Malaysia, we do not possess this piece of legislation. To adopt the decisions of *Murphy* and *D & F Estates* which are based on a foreign policy of no application here would leave the entire group of subsequent purchasers in this country without relief against errant builders, architects, engineers and related pesonnel who are found to have erred. If there is any fear that this approach may encumber the local authorities to pay out substantial claims due to their negligence in granting approvals or inspecting building works, there is s. 95 of the Street, Drainage and Building Act 1974 which prohibits such authorities to be sued.

This legal principle for accepting a claim for economic loss is obviously not only confined to defective buildings and structures. It has far greater impact on all situations by analogy and if limited by the limitations imposed as in

Murphy and *D & F Estates*, it would be grossly inequitable with justice not being served. For these reasons, it is the opinion of the court that a claim for pure economic loss can be entertained in an action for negligence.

Now that the court has found that a claim for pure economic loss can be entertained, we shall return to the circumstances of our case. The legal principles to be applied in this claim of negligence against the first and/or fourth defendants must certainly be that of *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 118 since this is a claim based on professional negligence. As this principle is similar to that as found under the cause of action for breach of contract which has been elaborated earlier, and since the facts are also identical, there is no necessity for the court to re-examine them. Based on similar grounds as those stated earlier under the cause of action for breach of contract, the court hereby finds the first and/or fourth defendants liable to the plaintiffs for negligence.

Against The Second Defendant

The court shall now move on to the plaintiffs' claim against the second defendant, the Majlis Daerah Gombak. The claim, from the pleadings is based on negligence and breach of statutory duties. The plaintiffs felt that the second defendant owed the residents in the vicinity of, *inter alia,* Lot 3008, legal duties which included (expressly or impliedly) among others, the following:

(1) to execute works of such general advantage to the inhabitants of the local authority area;

(2) to do all things necessary for or conducive to the public safety, health and convenience;

(3) to do or cause to be taken or done such steps or acts so as to prevent matters which are likely to endanger public safety or cause damage to properties within the local area including and not limited to the proper supervision and examination of proper and safe drainage and flow of water within the area and the removal of any dangers arising therefrom; and

(4) supervision and approval of, *inter alia*, building plans in respect of buildings and other structure proposed to be built or erected within the local authority area.

In the particulars of the plaintiffs' statement of claim, further elaborations are given as follows:

(1) approving building plans submitted without supervising, *inter alia*, the details of design, the adequacy of soil test;

(2) failing to take steps to rectify the erosion adjoining and surrounding the river banks by realigning the river thereby causing an erosion of tow of slope and enhancing the damage; and

(3) in all circumstances of the case, failing to take adequate steps to prevent danger being caused to neighbouring properties and such steps to ensure public safety to the inhabitants of the local authority area.

The second defendant is a statutory body created under the Local Government Act 1976 on 1 January 1977. From the statement of claim, though the allegations of breach with particulars are spelt out, there is no mention of what specific provision and of which statute binding on the, second defendant has been breached. Though questions during trial were directed to witnesses in relation to the Street, Drainage and Building Act 1974 ('Act 133') and the Uniform By-laws 1984, it was not until the plaintiffs' counsel's submission that the following specific sections of the laws are said to be breached:

(1) Section 101(ee) of the Local Government Act 1976 relates that 'the local authority shall have the power to divert, straighten, defined and canalise the course of any stream, channel or watercourse';

(2) Section 53(1) of Act 133 requires the local authority to maintain and keep in repair water courses under the control of the local authority;

(3) Section 70A of Act 133 empowers the local council to order cessation of earth works where the safety of life or property is affected or is likely to be affected;

(4) By-laws 8(3) and 17 of the Uniform Building By-Laws 1984 confers powers on local authority to disapprove building and structural plans submitted for its approval;

(5) By-law 10 of the Uniform Building By-Laws 1984 sets out a requirement for building plans submitted to local authority, to contain complete lines of surface water discharge to the proposed drains, which the plaintiffs claim was absent in the site plans for their lot submitted by the first and/or fourth defendants; and

(6) By-law 25(2) of the Uniform Building By-Laws 1984 requires that 'all ... open spaces in and around buildings shall be suitably protected against soil erosion', of which the second defendant has failed to ensure relevant steps to protect this.

From these allegations of the plaintiffs, three matters need to be considered.

Firstly, whether the pleadings of the plaintiffs sufficiently disclose material facts to support the plaintiffs' claim for breach of statutory duty against the second defendant. In order to succeed under a cause of action for breach of statutory duty, the plaintiffs must show that they came within the class of person intended by an Act or regulation to be protected, that the statutory provision was broken, and that they suffered damage and that this damage was caused by the breach of the provision – see *Atkin Court Forms* vol. 20 (2nd edn) (1993 Issue) p. 226. In essence, the entire claim based on breach of statutory duty depends on the provision of the statute or by-laws being alleged to be breached. The affected legal provision has thus become a material fact that needs to be disclosed, for failure to do so will cause the defendant to be caught by surprise and be prejudiced in their defence. Unlike the general principles of pleading where laws need not be pleaded, in an action based on a breach of statutory duty, it is absolutely necessary and essential for the plaintiffs to disclose the specific legislation affected; for it is the basis for the plaintiffs' claim. In fact, this is the approach recommended in the *Atkin Court Forms*, where all the precedents covering this aspect of the claim fully disclose the relevant provision of the statute or by-laws alleged to be breached.

In this case, the second defendant suddenly found itself being alleged to have breached a substantial number of laws and by-laws during the course of the plaintiffs' submission. Though in the course of questioning various witnesses, matters were raised relating to approval and supervision of the house before, during and after its construction, and matters relating to who was in charge of rivers, there was no indication on issues relating to protection against soil erosion, complete lines of surface water and cessation of earth works where safety of life and property are affected. These must be matters which came to the attention of the plaintiffs while preparing their submissions. To allow them to be suddenly raised at this stage would be completely unfair to the second defendant who had no opportunity to prepare and answer them.

Secondly, the Uniform Building By-laws 1984 in which various provisions are said to have been breached did not come into force in the State of Selangor until 1 January 1986. The building plans of the house was submitted around 1984 and the completed house was handed over for possession to the plaintiffs on 11 April 1985. Therefore, any allegations for breach of statutory duties which involve the second defendant in respect of this piece of legislation before it came into force cannot be sustained; there being no enacted statute at the material time to be breached. Though the second defendant may have relied on this by-law as a guideline in the course of their duties before the enactment of this statute in the State of Selangor, in a claim for breach of statutory duty, reliance must be on a lawful enactment and not on a piece of legislation that has no force of law in a particular area.

Thirdly, by virtue of s. 95(2) of Act 133:

> The State Authority, local authority and any public officer or officer or employee of the local authority shall not be subject to any action, claim, liabilities or demand whatsoever arising out of any building or other works carried out in accordance with the provisions of this Act or any by-laws made thereunder or by reason of the fact that such building works or plans thereof are subject to inspection and approval by the State Authority, local authority or such public officer or officer or employee of the State Authority or the local authority and nothing in this Act or any by-laws made thereunder shall make it obligatory for the State Authority or the local authority to inspect any building, building works or materials or the site of any proposed building to ascertain that the provisions of this Act or any by-laws made thereunder are complied with or that plans, certificates and notices submitted to him are accurate.

This exemption clause is clear, explicit and unambiguous in preventing this cause of action against the second defendant to succeed even in the event of a breach of such statutory duties by the second defendant. The plaintiffs' counsel feebly attempts to overcome this provision by submitting that this proviso is only applicable where works were carried out, and not when no work, as in this case, has been done. This argument is completely devoid of merit, for this s. 95 of Act 133 even exempts obligations on the part of the second defendant to carry out certain functions provided for by the Act and any by-laws made thereunder.

Based on the reasons stated above, the plaintiffs' claim against the second defendant for breach of statutory duty must therefore fail.

Turning now onto the plaintiffs' claim against the second defendant on negligence. There is no necessity for the court to repeat the authorities and similar line of approach adopted in the cause of action for negligence against the first and/or fourth defendants. The same principle and ruling apply here except that in respect of the second defendant, they are exempted from being sued under s. 95 of Act 133. Whether it is a cause of action for breach of statutory duty or negligence, the second defendant is not subjected 'to any action, claim, liabilities or demand' arising out of the facts as disclosed in the case. Accordingly, the court hereby dismisses the plaintiffs' claim against the second defendant for negligence.

For the second defendant, the plaintiffs' entire claim against them must therefore be dismissed with costs.

Against The Third Defendant

The plaintiffs' claim against the third defendant is basically for unnecessarily allowing infiltration or seepage of water into the ground and/or allowing it to overflow onto Lot 3007 causing saturation in the soil resulting in landslide which brought down the house. To support this contention, four allegations were made against the third defendant. They are:

(1) inserting a pipe into the public drain fronting Lot 3009 which caused rainwater to overflow onto Lot 3009, Lot 3008 and Lot 3007;

(2) blocking the public drain fronting Lot 3008 with plastic sheets and wooden debris thereby causing rainwater to overflow onto Lot 3008 and Lot 3007;

(3) excavating a trench measuring 60 feet x 10 feet x 3 feet on Lot 3008, causing it to collect a concentration of rainwater which seeped and infiltrated into the ground; and

(4) leaving transverse drains built along the slope of Lot 3008 to end three quarter of the way down the slope instead to the river.

As regards to the first allegation, the pipe was laid over a certain section of the public drain fronting Lot 3009 where the concrete culverts were removed. The purpose for this exercise was to enable supply lorries to roll into Lot 3009 where the third defendant had used it as a storage area to construct the house on Lot 3008. The first plaintiff in his testimony was very confused as to whether the pipe was made of clay or metal while the third defendant maintained that it was a metal pipe which was never clogged.

A photograph, exh D21(2) was made available for the court's examination. It shows a metal pipe with a watermark of 3/4 in height around the circumference. It is made of metal instead of clay and there are no signs that it has been broken. With this watermark of 3/4 height at the circumference, in all probability the pipe was seldom full to its brim to have caused the water to overflow. All these dispell the plaintiffs' first allegation, and without more positive evidence in support other than the first plaintiff's recollections which are contradicted in material particulars by the photographs, the court finds the first allegation against the third defendant without merits.

The next allegation is the blockage of the public drain fronting Lot 3008 with plastic sheets and wooden debris. Substantiating this further, the plaintiffs' counsel points out a 1/2 piece concrete culvert left on one side of the public drain as can be seen from the photograph view K tendered by the third defendant. The third defendant of course denies all this and insists that at no time was this area blocked.

Faced with this situation of conflicting oral testimonies, the court is forced to examine other evidence, and the best available are the photographs tendered. These photographs though taken after the event are proximate enough to give the court an indication of the condition of the place at the material time.

Firstly, the public drain was about 3 feet deep measuring from the bottom of the culvert to the level of the ground. With this depth and from testimonies of various witnesses, the court finds that the public drain was sufficient to carry off any rainwater from the front section of Lot 3009 and Lot 3008. From the photographs, except for a zinc sheet shaped to form a groove to direct rain water coming down from Lot 3009 on to the public drain of Lot 3008, there are no wooden planks or plastic sheets indicated in this area. The 1/2 piece of concrete cilvert laid by the side of the public drain does not seem to be from any part of the drain, as no part of the public drain seems to be disturbed. It looks more like an alien object in the surrounding environment, and by its diminutive size it could not had caused any detrimental, and by its diminutive size it could not had caused any detrimental effect to the flow of the water in the drain. In fact, the photographs show the public drain in this part of the land to have a continuous, uninterrupted run. From these, the conclusion the court arrives at is that there could not have been any blockage of the drain in the manner alleged by the first plaintiff. The third defendant had a wide open area in Lot 3009 to store their equipment and waste, and there is no necessity to dump unwanted materials into this section of the land.

The third allegation is the excavated trench near Lot 3009 for the foundation of a retaining wall between Lot 3009 and Lot 3008. According to the first plaintiff, this trench had collected rainwater, and a measurement by him taken with the aid of a stick just a few days before the collapse of his house was three feet deep. By pure arithmetic calculation, this works out to be 1,800 cubic feet of water. The retention of this water, according to Dr Ramli, 'allows the water to seep into the ground easier from the base of the excavation. This will contribute to the increase in the infiltration rate'.

The third defendant though admitting to the existence of this trench explain that a one inch lean cement had been laid at its base when the plaintiffs' house collapsed, and at most, if there was any collection of rainwater therein, it would only seep through the sides and not its bottom. In any event, if this did happen, it would have filtered to the ground and out onto the public drain which was close by. Further, the third defendant asserts that whenever there was any water in the trench, it was immediately extracted by a pump. Concern was also raised by the third defendant that Dr Ramli did not carry out any tests to determine the exact amount of water in this trench that would seep into the ground and infiltrate onto Lot 3007, or whether it did infiltrate into Lot 3007 at all.

This trench was indeed a formidable excavation. If ever water was collected therein, it would definitely form an accumulated mess. If allowed to sink into the ground, it would not only be in concentrated form but would also infiltrate directly, excessively and rapidly into the soil and at a much deeper level. Much of this would eventually escape to Lot 3007 since water by force of gravity will flow from higher ground to the lower area. Of course, the infiltration of the water would also depend on the constitution of the trench. If it is exposed without the lean one inch thick concrete at its base then the exposed soil would absorb the water at a greater rate and intensity. With a lean concrete base, the absortion, as admitted by the third defendant's witness, would only be through its sides.

The first plaintiff testifies that this trench was entirely earthen while the defendants contradict it by stating that the lean concrete had been laid when the house collapsed. Siding with the first plaintiff, Dr Ramli testifies that when he visited the site after the collapse of the house, he could, 'see some earthen base' in the trench when he checked it. The court tends to accept this as a fact, for there is no reason for Dr Ramli to be untruthful as to facts. Though he was called by the plaintiffs to testify, his assignment to investigate into the cause of the collapsed house is independant. Further, he was at the site soon after the collapse and things he saw most would probably represent things as they were before the collapse. When the trench was earthen, it was without the lean concrete, and in this exposed state, it would accelerate the infiltration of the mass of water accumulated therein to the ground from all its sides. With such a substantial volume of water, going by the estimate calculated by the first plaintiff, it would definitely be a contributing factor for the slope failure when it infiltrated into the soil.

As for the third defendant's assertion that any rainwater collected therein will be pumped out, the court finds this excuse as an afterthought. The first plaintiff had personally measured the water a few days before the collapse and this aspect of the evidence is not contradicted. If this measurement could be taken, the water must had remained there and not pumped out immediately as claimed.

The last allegation of the plaintiffs again the third defendant centers on the transverse drains that stopped short of the river. Water carried in these drains was discharged to the lower slope of Lot 3008. It would then travel down to the river through naturally formed earth drains. The explanation offered by the third defendant for not extending such drains to the river was because the boundary of Lot 3008 stopped short of the river, and any construction leading to the river would trespass onto government land.

Without the need of any experts, this approach is certainly defective for the lower part of this slope will be left vulnerable to erosion. The water concentrated from the transverse drains suddenly discharge onto an earthen part will very likely cause an erosion on this part of the land. When this part of the land which supports the soil of the above portion fails, the slope will come tumbling down. From the photographs taken after the collapsed of the plaintiffs' house, extensive soil erosion did indeed occur on the lower slope of Lot 3008. The nature of the erosion seems to be in the form of a drag movement, and this is a probable contributing factor to the failure of the slope on Lot 3007 leading to the collapse of the plaintiffs' house.

The cause of action against the third defendant is based on nuisance, negligence and the rule of *Rylands v. Fletcher.* As for liability in respect of water, it is best stated in *Clerk & Lindsell on Torts* (13th edn) at p. 851 (para 1498), of which was adopted by the Federal Court in *Seong Fatt Sawmills Sdn Bhd v. Dunlop Malaysia Industries Sdn Bhd* [1984] 1 MLJ 286. It reads as follows (at p. 289F-G)

> Liability in respect of water depends on whether the water is naturally on the land or whether it is artificially accumulated or interfered with in some way. The owner of land on a lower level cannot complain of water naturally flowing or percolating to his land from a higher level. Nevertheless, the higher proprietor is liable if he deliberately drains his land onto his lower neighbour's land and this appears to be so if the water is caused to flow in a more concentrated form than it naturally would, as the result of artificial alterations in the levels and contours of the higher land.

When water appears upon the surface of the land in a diffused state, with no regular course, and then disappears by percolation or evaporation, Winderyer J in an Australian case of *Gartner v. Kidman* [1962] ALR 620 has this to add:

> The higher proprietor: He is not liable merely because surface water flows naturally from his land on to lower hand. He may be liable if such water is caused to flow in a more concentrated form than it naturally would. It flows in a more concentrated form that it naturally would if, by the discernible work of man, the levels or conformations of land have been altered and as a result, the flow of surface water is increased at any particular point. If a more concentrated flow occurs simply as the result of the 'natural' use of his land by the higher proprietor, he is, generally speaking, not liable. What is a natural use is a question to be determined reasonably having regard to all the circumstances, including the purpose for which the land is being used and the manner is which the flow of water was increased: as for example whether it is agricultural land cleared for grazing, whether it is a mining tenement, or is used for buildings and so forth.

In this case, the third defendant had artificially accumulated the rainwater with the excavation which was an alteration to the nature of the land. They had also interfered with the rainwater by constructing transverse drains ending three quarter way down the slope of Lot 3008. All these had affected the natural flow of the water resulting in its concentrated and increased infiltration into the land thereby causing destructive effect to Lot 3007. By such deeds, the third defendant have breached their duty of care towards the plaintiffs in respect of negligence, caused nuisance to the plaintiffs, as well as being liable in part under the rule of *Rylands v. Fletcher*.

Though the third defendant did claim contributory negligence from the plaintiffs, from the evidence so tendered, the court finds no support for it. The plaintiffs have built a house according to plans advised, drawn and designed by the first and/or fourth defendants. They have even taken precautionary steps to place piles along their slopes and sand bags at toe of both Lot 3008 and Lot 3007. They had also advised the third defendant to take precautionary measures in their construction on Lot 3008. These were positive actions which cannot be interpreted as having contributed to the third defendant's negligence.

As the court has found the first and/or fourth defendants liable to the plaintiffs, the apportioned of liability between the defendants shall be as follows: first and/or fourth defendants to be 60% liable with third defendant responsible for the balance of 40%. As quantum has been agreed upon, it shall be apportioned according to this liability so found. There shall also be costs to the plaintiffs by the defendants.